In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 286

UNITED STATES OF AMERICA, APPELLANT

v.

DIEBOLD, INCORPORATED

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

Diebold, in undertaking to foreclose full consideration of this appeal, asserts that the district court correctly concluded that Diebold's acquisition of HHM's assets fell within the "failing company" exception created in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291, and that no further review is warranted by this Court. We believe the district court misconceived this Court's decision in *International Shoe.* In any event, the issue as to the scope of the exception is substantial and it is desirable that this Court clarify the boundaries of the doctrine.

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1. Diebold acknowledges that it paid a "substantial sum" for the assets of HHM (Motion, p. 21, n. 15), that it committed itself to the purchase notwithstanding its awareness of at least one significant inaccuracy in the HHM interim balance sheet upon which it relied in connection with the sale (*id.*, p. 11 n. 8), and that during the period when HHM was allegedly *in extremis* Diebold, prompted by the repeated efforts of Mosman, HHM's president, to get out of the contract, made contract revisions favorable to HHM and Mosman personally (*id.*, p. 21, n. 16). Diebold also does not dispute the government's data (J.S. 9–11) showing that in the fiscal year 1959, which was the year Diebold and HHM agreed on the basic terms of the sale,[1] HHM's net sales were the third highest in its history—just 6% below its peak in 1957; that, for the five fiscal years ending in 1959, HHM's net income after taxes ranged in round figures from $117,000 to $256,000 and that HHM's net income in 1959 of $188,000 was the second highest for the period; that HHM had paid dividends each year during that period; that in 1959 its working capital of over $1,300,000 was the highest in its history and its working capital ratio the third highest; that as of the end of the fiscal year 1959 HHM was free of long-term debt, having within the preceding two years completed payment of noncurrent bank loans as well

[1] An oral agreement for the sale of HHM's assets was reached by May 1959. In June, an Option (to which was attached an Agreement of Purchase and Sale) was signed. In July, the parties executed the Agreement and the closing took place on September 11, 1959. (Koontz Affidavit, pars. 5–18, filed September 1, 1959; Fdgs. 1–2, J.S. 23.

as of the mortgage on its land, building and equipment; that during fiscal 1959 it reduced its liability on notes and loans currently payable from over $700,000 to under $300,000; and that it enjoyed a good credit reputation.

Diebold argues that the district court was nevertheless correct in summarily dismissing the government's complaint and in viewing the data as to HHM's long-term financial picture as "irrelevant and noncontrolling" (Motion, p. 19). The relevant and central consideration, Diebold urges, was "HHM's current position during the summer of 1959" (*ibid.*). During this period, following "a long period of expansion" allegedly supported by "inadequate working capital," there was a "cutback in sales" and a "sudden, sharp increase of inventories" (*ibid.*).[2] Accordingly, HHM's cash assets were not sufficient to pay its bills as they became due (*id.*, pp. 18–21).

[2] What Diebold characterizes as a "cutback in sales" takes as its starting point sales made by HHM in its *peak* year, 1957, and apparently refers to the difference between sales of $10,670,000 made in that year and sales of $10,023,000 made in 1959, which was still its third best year (See J. S., p. 9). The "sudden, sharp increase of inventories" apparently refers to inventories which went from $1,833,652 in 1957 to $1,644,598 in 1958, to $1,906,342 in 1959 (Lybrand, Ross Report #2, Summary of Statements of Assets, filed in support of motion for summary judgment). Regarding "inadequate working capital," it should be noted that in the fiscal year 1959 HHM's working capital of over $1,300,000 was the highest in its history and its working capital ratio of 1.68 was barely exceeded only in 1951 and 1952 when the highest ratio of 1.70 was achieved (Singman Affidavit, Ex. 9, filed March 1, 1961).

Thus, the issue, even accepting the accuracy of Diebold's characterizations, is whether the "failing company" exception created in *International Shoe* extends to the acquisition of a company which is temporarily without sufficient cash to pay its bills as they become due, where there has been no showing that the company could not have raised the money and where the company was completely free of long-term debt, had a good credit reputation, and had a long record of good earnings and dividend payments.[3] This issue is substantial and it is highly desirable that this Court make a "firm declaration * * * emphasizing the narrow scope of the exception." Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics,* 74 Harv. L. Rev. 226, 341–342. Otherwise, "in the ethos of the 'big antitrust case' * * *, the defense may be attempted even if the chances of success seem small * * * for even if business failure seems remote, evidence of financial weakness may tend somewhat to reduce the apparent

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[3] Also involved, as noted in our Jurisdictional Statement (pp. 4, 15, 20, 21), is the further question whether the underlying issues could properly be determined on motion for summary judgment. See *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U.S. 620, 624, 627; *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256–257; 6 Moore's *Federal Practice* (2d ed.) par. 56.15[3]. Had the matter gone to trial, the government would not have been foreclosed from showing that, to a large extent, the deterioration in HHM's cash position came *after* HHM and Diebold had orally agreed in May 1959 on the basic terms of the agreement providing for Diebold's payment of $3,000,000 in cash and the assumption of HHM's liabilities (see n. 1, *supra*, p. 2), and that the subsequent weakening in HHM's account was not the result of any inherent weakness in the company's operating performance or financial condition.

significance of the disappearance of the acquired firm from the market." *Id.* at 341. (See also our Jurisdictional Statement 20–21.)

2. The ruling below permitted one of three dominant firms in the field to acquire the third largest firm.[4] It is obvious that the policies of Section 7 would have been better served by a sale to almost any other purchaser. The court, however, did not require a showing that reasonable efforts had been made to find another purchaser. It merely found that, of the three non-competing potential buyers who had expressed an interest in purchasing HHM, none had made a "firm" offer and that Diebold was the only firm willing to pay $3,000,000 in cash (Fdg. 26, J.S. 32). These facts alone did not justify the court's failure to explore more fully the price and terms which the potential buyers might have been willing to submit. For "the owner's desire to receive a high price [or only cash] is only one of several interests underlying the failing-firm defense," and the defendant's desire "to enhance his position in the market" may induce him to inflate his price. Bork, *supra,* 74 Harv. L. Rev. at 346. It is therefore

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[4] Diebold characterizes as "pure assertion" (Motion, p. 2, n. 1) the government's allegations in its complaint (pars. 6–8) that Diebold and HHM were two of the three dominant firms in the relevant market. But the district court in summarily dismissing the complaint necessarily assumed that the government, if it had been allowed to go to trial, would have proved its allegations as to the positions of Diebold and HHM in the relevant market.

important that this Court should hold that, before the "failing company" defense is accepted, there must be a full inquiry into whether reasonable efforts have been made to find other buyers and into the price and terms upon which such other prospective buyers were interested in dealing.

Respectfully submitted.

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